STATE OF MICHIGAN

COURT OF APPEALS

PAUL NAZ, MARY JANE NAZ, and PAUL NAZ REVOCABLE LIVING TRUST, Plaintiff-Appellants, v JEROLD AGRON and MORGAN STANLEY DW, INC., Defendant-Appellees.	UNPUBLISHED April 20, 2006 No. 259110 Wayne Circuit Court LC No. 03-339967-CZ

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Plaintiffs, Paul and Mary Jane Naz, husband and wife, and the Paul Naz Revocable Living Trust, appeal as of right from the trial court's order granting summary disposition[1] in favor of defendants Jerold Agron and Morgan Stanley DW, Inc. We affirm.

I. Basic Facts And Procedural History

This action arises out of plaintiffs' financial investment with defendants' brokerage firm. Defendant Jerold Agron is a licensed brokerage dealer employed by Morgan Stanley DW, Inc., and he has been plaintiffs' stockbroker for more than 30 years. During those 30 years, plaintiffs developed specific criteria regarding the types of investments that they would purchase. Agron was allegedly aware of these criteria because of his long-standing business relationship with plaintiffs. The most important criteria were the yield rate on the bonds, the name of the entity issuing the bonds, and preserving the principal of the investments. Plaintiffs purchased only investment grade bonds that would be expected to trade within five percent of their par value. The bonds that plaintiffs purchased would typically have a maturation longer than plaintiffs' life expectancy.

[1] Although defendants title their motion as a "motion to dismiss," it was actually a motion for summary disposition under MCR 2.116(C)(4), (7), and (8). Accordingly, we will refer to this motion as a motion for summary disposition.

Plaintiffs typically did not purchase industrial revenue bonds because they believed, in light of their investment goals, that those bonds were too risky because they were not backed by the full faith and credit of a governmental entity. In 1996, Agron recommended that plaintiffs purchase a particular type of bond, and based on Agron's recommendation, plaintiffs agreed to invest in certain bonds costing $104,083.18, which plaintiffs believed were backed by a governmental entity, the Indianapolis Airport Authority. The bonds that plaintiffs purchased, however, were not backed by the Indianapolis Airport Authority, but instead, were backed by United Airlines. These bonds were industrial revenue bonds, which have a much higher risk associated with them than bonds that are backed by the full faith and credit of a governmental entity. Plaintiffs sold the bonds on November 12, 2003, for $34,000, which was more than $70,000 less than they had initially invested in the bonds.

Plaintiffs signed agreements providing that disputes between themselves and defendants shall be arbitrated before the National Association of Securities Dealers (NASD), the New York Stock Exchange (NYSE), the Municipal Securities Rulemaking Board (MSRB), or the National Futures Association (NFA). But the parties now agree that the NFA will not hear plaintiffs' claims because the bonds at issue are not "futures" and that the MSRB no longer conducts arbitrations.

Instead of seeking to arbitrate their claims with the NASD or NYSE, however, plaintiffs filed a complaint in early December 2003, alleging breach of contract, negligence, fraud, breach of fiduciary duty, and breach of federal and state securities laws. The tenor of plaintiffs' allegations was that there was an implied agreement that they would purchase only those bonds that were backed by the full faith and credit of a governmental entity and that defendants breached that agreement, were negligent, committed fraud, breached their fiduciary duties, or violated securities laws by recommending to plaintiffs that they buy a different type of bond without properly informing plaintiffs of the difference. Plaintiffs contended that defendants were actually aware, or should have been aware, that United Airlines issued the bonds, even though plaintiffs did not discover this fact until June 10, 2003.

After being served with plaintiffs' complaint, defendants requested that plaintiffs arbitrate their claims. Accordingly, plaintiffs' counsel requested the entry of a court order directing the matter to arbitration because the six-year limitations period set forth in NASD Rule 10304, which the parties agreed had expired, was inapplicable to "any case which is directed to arbitration by a court . . . ."[2]

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[2] The NYSE has a substantially similar rule, NYSE Rule 603, which states:

> No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

Negotiations for the proposed order allegedly fell through, and defendants then filed a motion for summary disposition. Defendants argued that plaintiffs' action should be dismissed according to the three arbitration agreements and that plaintiffs were not entitled to an order directing the matter to arbitration because, among other things, such an order would unfairly deprive defendants of their right to challenge the "eligibility" of plaintiffs' arbitration claim in light of the six year limitations period.

The trial court decided the motion in favor of defendants:

> There is a contract between the parties and on at least three different occasions in 1996, I believe, another point during the 1990s and as recently as 2002 and I don't have the exact portion of the brief that states the chronology but I think I'm right, three different times the plaintiffs agreed to arbitrate disputes between it and the defendant. I don't think there's any question but that that was, in fact, the agreement. In fact, plaintiff does not allege that they were not obligated to litigate the matter in the arbitration forum.
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> What plaintiff alleges to this point, basically, is that they ought to be able to bring this matter in the Circuit Court despite the passage of time because otherwise if they go to arbitration they're going to impose the arbitrator or the arbitrators will impose the rule and the eligibility rule and say well, you're too late, it's untimely, you're out of here. This is simply a contractual issue as far as this Court is concerned. There was an agreement to arbitrate. Plaintiffs have declined for whatever reason to arbitrate this matter. It's – I've been cited to nothing by the plaintiff that says in the face of a contract or three different contracts to arbitrate, the plaintiff can decide that they will file an action in court because it looks like time is running out and they better do something in court. For that reason, I am dismissing this matter and the plaintiff can take whatever action it deems appropriate to address its client's rights or to protect its clients' rights.

Following plaintiffs' motion for reconsideration, which the trial court denied, plaintiffs filed this appeal.

II. Summary Disposition

A. Standard Of Review

Plaintiffs argue that the trial court erred by granting defendants' motion for summary disposition and by refusing to enter an order directing this matter to arbitration. Although the trial court did not articulate the specific court rule under which it granted defendants' motion for summary disposition, the record clearly indicates that the trial court dismissed plaintiffs' claim based on arbitration agreements signed by the parties.

MCR 2.116(C)(7) allows for summary disposition when "the claim is barred because of . . . an agreement to arbitrate . . . ." We review de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(7).[3] In reviewing a motion under MCR 2.116(C)(7), "[w]e consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them."[4] Additionally, whether an arbitrator or the court should apply an NASD rule is a question of law that we also review de novo.[5]

B. Proper Forum

The parties agree that there is an agreement to arbitrate. Plaintiffs, however, argue that the rules governing arbitration render their ability to arbitrate this particular matter impossible. Plaintiffs, therefore, contend that the trial court should have either decided this case on the merits or entered an order referring this matter to arbitration.

NASD Rule 10304 provides:

> No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

The parties agree that more than six years have elapsed since defendants' alleged failure to properly inform plaintiffs about the exact type of investment they were making when plaintiffs bought the bonds at issue in April 1996.

In *Schwartz v Fagan*, this Court specifically addressed whether a court proceeding or arbitration is the proper forum to decide questions of timeliness under the NASD Rule 10304 limitations period.[6] After the failure of the Mortgage Corporation of America, several individuals who had invested through the brokerage services of Gregory J. Schwartz & Co. lost money and filed arbitration claims with the NASD.[7] Schwartz & Co. and one of its employees (Schwartz) filed suit to enjoin the arbitration.[8] The trial court granted summary disposition to the investors, concluding that the arbitrator, not the court, was the proper authority to decide the

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[3] *McKiney v Clayman*, 237 Mich App 198, 200-201; 602 NW2d 612 (1999).

[4] *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001), citing MCR 2.116(G)(5).

[5] *Schwartz v Fagan*, 255 Mich App 229, 231; 660 NW2d 103 (2003).

[6] *Schwartz, supra* at 231.

[7] *Id.*

[8] *Id.*

timeliness of the investors' claims.[9] The trial court referred the matters to arbitration, and Schwartz appealed.[10] On appeal, this Court considered Schwartz's claim that the trial court erred in failing to determine the eligibility of the defendants' claims under the limitations period.[11] In analyzing the issue, the *Schwartz* Court adopted the reasoning of the United States Supreme Court in *Howsam v Dean Witter Reynolds, Inc*.[12] Relying on *Howsam*, the *Schwartz* Court concluded that absent a specific provision in the arbitration agreement stating that a court may apply NASD Rule 10304, or its equivalent, the rule should be applied by the arbitrator.[13]

In *Howsam*, the United States Supreme Court addressed "whether a court or an NASD arbitrator should apply [NASD Rule 10304] to the underlying controversy."[14] The Court noted that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide."[15] But the Court distinguished between "issues of substantive arbitrability" and procedural questions relating to time limits, laches, notice, estoppel, and other threshold doctrines.[16] The Court therefore concluded that, when an agreement to arbitrate exists, whether an applicable time limitation bars a claim is a "gateway procedural dispute[]"to be decided by the arbitrator, not the court.[17] The Court added that

> the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding.[18]

It is uncontested here that plaintiffs' claim is subject to arbitration. The fact that plaintiffs may not be able to satisfy the gateway requirement posed by NASD 10304 is inconsequential in deciding defendants' motion for summary disposition because that is a determination properly made by the arbitrator not the trial court. We therefore conclude that the trial court did not err in granting defendants' motion for summary disposition.

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[9] *Id*. at 230, 231.

[10] *Id*. at 230.

[11] *Id*. at 231.

[12] *Id*. at 231-233, 234; *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 85-86; 123 S Ct 588; 154 L Ed 2d 491 (2002).

[13] *Schwartz*, *supra* at 233.

[14] *Howsam*, *supra* at 81.

[15] *Id*. at 84.

[16] *Id*. at 85.

[17] *Id*.

[18] *Id*.

C. Rescission

Plaintiffs alternatively argue that the trial court should have rescinded the agreements under the doctrines of frustration of purpose, impossibility, or impracticability. Plaintiffs' arguments are premised on the presupposition that the arbitrator will refuse to hear their action under NASD Rule 10304. Because this determination has not yet been made, and it is a determination more properly made by the arbitrator and not this Court, these arguments are without merit. In any event, plaintiffs fail to produce evidence sufficient to support a finding of frustration of purpose, impossibility, or impracticability in order to rescind the contracts.

> The doctrines of frustration of purpose and supervening impossibility/ impracticability are related excuses for nonperformance of contractual obligations and are governed by similar principles. Frustration of purpose is generally asserted where "a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract."
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> Before a party may avail itself of the doctrine of frustration of purpose, the following conditions must be present:
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> (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him.[19]

To determine the application of the defense of impossibility, one must examine "'whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.'"[20] The circumstances excuse performance only to the extent to which performance is impossible, and the application of impossibility is based on the individual facts of each case.[21] Accordingly, whether plaintiffs are arguing frustration of purpose or impossibility/ impracticability, plaintiffs must show that the event or circumstance causing the frustration or impossibility was not foreseeable at the time the contract was made.[22]

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[19] *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133-135; 676 NW2d 633 (2003) (internal citations omitted).

[20] *Bissell v L W Edison Co*, 9 Mich App 276, 285; 156 NW2d 623 (1967), quoting 84 ALR2d 12, § 9, p 51.

[21] *Id*. at 286.

[22] *Liggett, supra* at 134-135; *Bissell, supra* at 285.

Here, the six-year "gateway requirement" of NASD Rule 10304 existed at the time the contracts containing the arbitration provisions were made. It was thus foreseeable and plaintiffs assumed the risk that their arbitration action could be time barred under this rule in the event that they failed to timely pursue their claim. Further, the event giving rise to the alleged frustration or impossibility—the expiration of the limitations period—was occasioned by plaintiffs' own failure to timely file their complaint. Therefore, plaintiffs fail to set forth any evidence that would warrant rescission of the arbitration agreements under the doctrines of frustration of purpose or impossibility/impracticability.

A notable corollary is plaintiffs' argument that the trial court erred by merely dismissing plaintiffs' action, without *ordering* the matter to arbitration. This issue is significant because plaintiffs would likely satisfy NASD Rule 10304 if the trial court had ordered the matter to arbitration as opposed to simply dismissing plaintiffs' circuit court action (a court order would presumably be sufficient to "direct" the action to arbitration). Plaintiffs argue that the trial court was compelled to order this matter to arbitration under the terms of the agreements. But this argument is also without merit.

Nothing in the terms of the arbitration agreements compelled the trial court to *order* the matter to arbitration. Rather, the agreements compel plaintiffs to pursue their action in arbitration, not file an action in circuit court ("all controversies . . . shall be determined by arbitration only . . . .") Further, although MCL 600.5001 allows the circuit court to enter judgment consistent with an arbitration award, the statute does not compel a court to enter an order directing the matter to arbitration if the plaintiff erroneously pursues the matter in circuit court. Plaintiffs have failed to cite state or federal statutory authority that compels the circuit court to order arbitration in addition to dismissing plaintiffs' action under MCR 2.116(C)(7). A party may not leave it to this Court to search for authority in support of its position by giving "issues cursory treatment with little or no citation of supporting authority."[23] We conclude that the trial court correctly granted defendants' motion for summary disposition under MCR 2.116(C)(7) and did not err by refusing to order this matter to arbitration.

III. Stay

Plaintiffs argue that the trial court erred by refusing to order a stay of proceedings instead of dismissing plaintiffs' entire claim. Although plaintiffs correctly note the potential consequence of the trial court's refusal to order a stay of proceedings while the parties participate in arbitration (that is, that the applicable limitations period would continue to run and could expire), plaintiffs fail to articulate any legal authority that compels the trial court to order a stay of proceedings in this matter.[24]

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[23] *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

[24] *Peterson Novelties*, *supra* at 14.

IV. Reconsideration

A. Standard Of Review

Plaintiffs argue that the trial court erred in denying their motion for reconsideration. We review for an abuse of discretion a trial court's decision with respect to a motion for reconsideration.[25] "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion."[26]

B. Legal Standards

In general, a party moving for reconsideration "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."[27] "This Court has held that the palpable error provision in MCR 2.119(F)(3) is not mandatory and only provides guidance to a court about when it may be appropriate to consider a motion for rehearing or reconsideration."[28]

C. Preclusion

Plaintiffs argue that the trial court erred because undisputed principles of Michigan law make it clear that the agreements between plaintiffs and defendants do not allow this case to be arbitrated. As discussed, it is undisputed that plaintiffs' claims are subject to the arbitration agreements entered into by the parties. Although NASD Rule 10304 could ultimately preclude plaintiffs' claims from being arbitrated should the arbitrator order as such, plaintiffs' argument that the arbitration agreements actually *preclude* the parties from arbitrating is illogical. We conclude that the trial court did not err by denying plaintiffs' motion for reconsideration.

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis

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[25] *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

[26] *Id*.

[27] MCR 2.119(F)(3).

[28] *People v Walters*, 266 Mich App 341, 350; 700 NW2d 424 (2005).